PENGKALEN CONCRETE SDN BHD

v.

CHOW MOOI & ANOR

HIGH COURT MALAYA, SHAH ALAM
SURIYADI HALIM OMAR J
[SUIT NO: MT1-22-702-2000]
31 MARCH 2003

CIVIL PROCEDURE: *Judgment - Default judgment - Setting aside - Application to set aside judgment in default of appearance - Defence on the merits - Whether serious bona fide issues to be tried*

CIVIL PROCEDURE: *Writ of summons - Service - AR registered post - Whether named person in writ must be same person to acknowledge AR card - Whether all prerequisites to effect service fulfilled - Whether good service of writ had taken place*

The defendants had stood as guarantors for a sum of money owed by Kin Hup Seng Construction Sdn Bhd ('the company') to the plaintiff. The company had defaulted, thereafter two separate writs and statement of claims were filed and served by the plaintiff against the defendants. Both defendants were absent on the return date and an order of 'judgment in default' ('JID') was meted out against them. The defendants, on 25 July 2002 applied to have the said JID set aside but failed. Hence, the defendants appealed.The defendants submitted that the AR card had been returned with the name 'Yanti' inscribed on it whilst their names were far from that, thus someone else had acknowledged the said AR card. Furthermore, the defendants submitted that they were outside the shores of Malaysia from 13 March 2001 and had only returned on 6 April 2001. Therefore, as they knew nothing of the summonses or claims, they had done nothing to counter the alleged statement of claims. The plaintiff countered, stating that the summonses had been sent by AR registered post on 2 March 2001 with receipt of them being on 8 March 2001, dates that indicated service and receipt of the summonses had taken place before the supposed exits of the defendants from Malaysia.

Held:

[1] There is no indication under O. 10 r. 1(1) of the Rules of the High Court 1980 that the plaintiff must evidentially prove that the named person in the writ must be the very person who had received it ie if it was sent by prepaid AR registered post. In this case, the plaintiff had fulfilled all the

prerequisites, therefore the recipient being "Yanti" did not vitiate that service. It was construed that the defendants had constructive notice of the issuance of the summonses. With no rebuttal evidence adduced, and every precondition adhered to, good service of the writ had taken place. Also, there was no *prima facie* evidence, raising serious issues as *bona fide* reasonable defence that ought to be tried. The defendants were not serious in their attempts to challenge the plaintiff. (pp 329 f-i, 331 a-b & g-h)

[Appeal dismissed.]

Case(s) referred to:

Allied bank (Malaysia) Bhd v. Yau Jiok Hua [1998] 2 CLJ 33 HC ***(refd)***

Hasil Bumi Perumahan & Ors v. United Malayan Banking Bhd [1994] 1 CLJ 328 ***(refd)***

Idris Hj Salleh v. Federal Auto Holdings Bhd [1979] 2 MLJ 141 ***(refd)***

MBf Finance Bhd v. Tiong Kieng Seng [2001] 4 CLJ 38 HC ***(refd)***

OCBC Bank (M) Bhd & Anor v. Livision Sdn Bhd & Ors [2001] 5 CLJ 433 HC ***(refd)***

RHB Bank Bhd v. FGG Wood Moulding Industries Sdn Bhd & Ors [2001] 3 CLJ 661 HC ***(refd)***

Tan Chiang Brother's Marble (S) Pte Ltd v. Lightweight Concrete Sdn Bhd [1997] 4 CLJ 759 HC ***(refd)***

Tan Ooi Chee & Anor v. Kanching Realty Sdn Bhd [1989] 1 MLJ 519 ***(refd)***

Legislation referred to:

Interpretation Act 1967, s. 12

Rules of the High Court 1980, O. 10 r. 1(1)

For the plaintiff - Prakash Mehta; M/s Prakash & Co

For the defendant - Yokinee Selvam; M/s Manjit Singh Sachdev, Mohammad Radzi & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Suriyadi Halim Omar J:

The defendants who are husband and wife, also business partners, had stood as guarantors for a sum of money owed by a company called Kin Hup Seng Construction Sdn Bhd to the plaintiff. The former had defaulted, and the defendants thereafter became the soft target of the plaintiff. Both defendants had agreed in their respective agreements, to use the same premises as their last known address. On 13 October 2000 two separate writs and statements of claims were filed, and served, as alleged by the plaintiff against the defendants. In April 2001 the senior assistant registrar had meted out the order of 'judgment in default' against both, as they were absent on the return date. He adjudged that the defendants were to pay the plaintiff RM1,115,149.50 inclusive of interest, and costs of RM225.

The defendants, on 25 July 2002 applied to have that judgment in default set aside but failed, thereafter to be followed by an appeal to the judge in chambers. On 16 January 2003 after hearing the appeal I dismissed it with costs.

Two separate summonses were indisputably posted to that impugned address. Regretfully, as stressed intensely by the defendants, on no account were there effective services at the address of the defendants, as confirmed by the AR card. The defendants admitted that the address was correct and was not disputed, but what was disputed was the service on them. They submitted that the AR card had been returned, with the name "Yanti" inscribed on it, whilst their names were far from that (exh. k3 as in en. 7). The defendants ventilated that as they had stood as guarantors, then service must also be personal, anything less being bad service.

According to the defendants they were outside the shores of Malaysia from 13 March 2001 and had only returned on 6 April 2001, with a passport and a ticket as their evidence. As they knew nothing of the summonses or claims, they did nothing to counter the alleged statement of claims. The plaintiff had ready answers to those averments. It had countered by stating that the summonses had been sent by AR registered post on 2 March 2001 with receipt of them being on 8 March 2001 (see S1). Those dates indicated that service and receipt of the summonses had taken place before the supposed exits of the defendants from Malaysia. Evidentially, I was convinced that by obtaining the written receipt from the post office, and later to be rewarded by the return of the AR card, satisfied me that everything necessary to effect service by using the post office had been carried out (*MBf Finance Bhd v. Tiong Kieng Seng* [2001] 4 CLJ 38). Returning to those two earlier exhibits, namely the passport and the ticket, I was also satisfied that they merely accentuated the assertion of the plaintiff that on the date of the services of the summonses, the defendants were in fact in Malaysia. To make things worse for the second defendant, there was a dearth of any exhibits, be they in the form of passport or tickets, to confirm that he was abroad at any time.

As regards service, for purposes of this case, O. 10 r. 1(1) would be pertinent, and the relevant portion reads as follows:

> Subject to the provisions of any written law and these rules, a writ must be served personally on each defendant **or by sending it by prepaid AR registered post addressed to his last known address** ... (emphasis added and hereinafter referred to as **"the second portion"**).

Reading the above provision, it is my view that a plaintiff has to consider first of all whether the writ must be served personally or not. Personal service requirement must be adhered to if the writ is "subject to any written law and these rules". The latter two words of "these rules" must mean the rules under O. 10 of the Rules of the High Court. If that writ is free of the requirements of any written law, and of rules under O. 10, or subsequently freed when permitted by a court pursuant to, say, a substituted service application, the plaintiff is thus free to allude to the "second portion" of the latter sub-rule ie, by sending it by prepaid AR registered post addressed to the defendant's last known address.

To have a successful postal service under that "second portion" (apart from establishing that there are no impediments in the like of any requirements by any written law and the rules under O. 10), a plaintiff must convince the court that:

i. a writ was sent;

ii. there is proof of sending;

iii. it was sent by prepaid AR registered post;

iv. there is proof of it being sent by prepaid AR registered post;

v. the address sent to was the last known address; and

vi. the court is convinced (requiring proof in the like of admitted facts, unrebutted affidavits etc.) that that address was the last known address.

To conjure or add something out of that brief "second portion", which had not been provided for, would tantamount to importing certain ingredients that were not envisaged by Parliament. In fact under sub-r. 1(1) of O. 10, nothing is indicated that the plaintiff must evidentially prove that the named person in the writ must be the very person who had received it ie, if it was sent by prepaid AR registered post. I therefore was satisfied that as in this case, if all the prerequisites were fulfilled, as the plaintiff had done so, the recipient being "Yanti" did not vitiate that service. In fact, whether that writ had physically arrived, or had been received at the last known address, normally confirmed by direct evidence, is not even legislated into that impugned provision. On that score, if the plaintiff had direct and cogent evidence of that writ having been received by the intended person, that was a plus factor for the former, otherwise s. 12 of the Interpretation Act 1967 would immediately come into play when invoked. Under the latter section, where a written law authorises postal service, then until the contrary is proved, service shall be presumed to have been effected

at the time when the letter would have been delivered, in the ordinary course of the post. Therefore, unless rebutted by the defendants, service thus must be deemed to have taken place. As it were I found no rebuttal evidence before me.

Further, contrary to what the defendants had ventilated, I had also failed to identify anywhere in that provision of the requirement of personal service, for cases which involved guarantors. Regretfully and with respect, I was thus unable to acquiesce and subscribe to the view put forward by the court in *OCBC Bank (M) Bhd & Anor v. Livision Sdn Bhd & Ors* [2001] 5 CLJ 433, where it opined that as the fourth defendant there was being sued as a guarantor, the service must be personal. It must be stressed that O. 10 r. 1(1) talks of a writ and not of, say a notice of demand (*Allied Bank (Malaysia) Bhd v. Yau Jiok Hua* [1998] 2 CLJ 33). A dissertation of the latter case revealed that the court was discussing the mode, methodology and requirement of service of a notice of demand by postal method, a legal requirement prior to the issuance of a writ (and not discussing the service of a writ). Suffice for me to merely advert to the portion of held (5c) in the latter case, which reads:

> In order to prove service of the notices of demand and the AR card, it must have been properly admitted in evidence. This was not done by the plaintiffs. In the absence of any evidence to show that the AR card had been returned duly acknowledged to constitute effective service of the notice of demand on the defendant, ... Therefore, there could be no presumption that the notices of demand were received by the defendant.

To complete the picture, in the event there is no dispute of the regularity of the service on the defendants, coupled with there being no objection pertaining to the address, or the procedure adhered to by the plaintiff, Kang Hwee Gee J in *RHB Bank Bhd v. FGG Wood Moulding Industries Sdn Bhd & Ors* [2001] 3 CLJ 661, also had occasion to opine that it must be construed that the defendants had constructive notice of the issuance of the summonses. Whether one wishes to call it constructive notice or deemed to have been served, either way, the complaint of the defendants here was not that there were infringements as to the preconditions of the postal service, but merely that someone else had acknowledged that AR card. Regardless of the nomenclature, given the facts before me I was satisfied that, with no rebuttal evidence adduced, and every precondition having been adhered to, good service of the writ thus had taken place.

It is trite that in a default judgment's case, the setting aside of that JID order is generally the norm. The presiding court before so doing, on the other hand must have some good reason and that there is a defence on the merits adduced before the court (*Tan Ooi Chee & Anor v. Kanching Realty Sdn Bhd* [1989]

1 MLJ 519). The supposed good reason given by the defendants, as I scrutinised the evidence was that they were unaware of the case being called up in court on 9 April 2001, founded on the abovementioned reason of non-service of the writs. Factually, even if I were to submit to those evidential assertions, by 6 April 2001 they were already in Malaysia, three days before their cases were called up in court. As I was satisfied that good service had taken place, this part of the ingredient ie, 'good reason' had fallen flat.

The next ingredient to be established by the defendants was whether there was a defense of merit before me for consideration ie, by at least filing their draft defences. In *Idris bin Haji Salleh v. Federal Auto Holdings Bhd* [1979] 2 MLJ 141 Syed Agil Barakbah J, had occasion to say:

> ... The courts in a case of this nature prefer that it be decided on merits and do not invoke procedural rules to prevent a defendant from defending an action unless it has no merits in his application.

The court in *Tan Chiang Brother's Marble (S) Pte Ltd v. Lightweight Concrete Sdn Bhd* [1997] 4 CLJ 759 in similar vein had remarked:

> A defence on the merits means a defence which discloses an arguable and triable issue. It does not have to show that there is a real aspect of success or that it has to carry some degree of conviction.

In the current case, it was indisputable that the defendants had failed to produce that all important draft statements of defense. Without them, I was thus without any option but to find again for the plaintiff, even on this second ingredient. Not only was there no *prima facie* defence, raising serious issues as *bona fide* reasonable defence that ought to be tried, but there was not even a sham one (*Hasil Bumi Perumahan & Ors v. United Malayan Banking Bhd* [1994] 1 CLJ 328). Not wishing to encourage a sham defense, and rhetoric aside what else could have I done? Common sense would convince anyone that to allow the appeal, and set aside a default judgment when no *prima facie* defence worthy of consideration was before the court, would portray the court as lame ducks prolonging the agony of all parties. Without them before me, I could only conclude that the defendants were definitely not serious in their attempts to challenge the plaintiff-delaying and defeating the latter from taking up more anticipatory drastic actions during these bad times, and waiting for better ones, being one of the conclusions that I could arrive at.